EXHIBIT I

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ANTOINE ROSS,

Plaintiff,

v. 16 Civ. 6704 (PAE)
REMOTE TELECONFERENCE

NEW YORK CITY, SADOC GENOVES, ROCHAURD GEORGE, et al.,,

Defendants.

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New York, N.Y.
November 23, 2020
3:00 p.m.

Before:

HON. PAUL A. ENGELMAYER,

District Judge

APPEARANCES

MoloLAMKEN LLP
Attorneys for Plaintiff
BY: JUSTIN M. ELLIS
SARA E. MARGOLIS
LAUREN F. DAYTON

NEW YORK CITY LAW DEPARTMENT
Attorneys for Defendants NYC, GENOVES, GEORGE
BY: JOSHUA A. WEINER

FRANKIE & GENTILE PC
Attorney for Defendant Willis
BY: JAMES G. FRANKIE

ALSO PRESENT: AARON DAVISON (NYC LAW DEPT.)

(The Court and all parties appearing telephonically)

THE COURT: Good afternoon. This is Judge Engelmayer. Let me begin by confirming with my law clerk that all counsel are on the line.

(Replies)

THE COURT: Is the court reporter on the line as well?

(Replies)

THE COURT: Good afternoon, Ms. Lynch. And thank you for your services.

Let me begin by taking the roll.

So, for the plaintiff, Antoine Ross, do I have Mr. Ellis, Justin Ellis, on the line?

MR. ELLIS: Yes. Good afternoon, your Honor.

THE COURT: Good afternoon.

Do I have Sara E. Margolis on the line?

MS. MARGOLIS: Yes, your Honor. Good afternoon.

THE COURT: Good afternoon.

And Lauren F. Dayton.

MS. DAYTON: Yes, your Honor. Good afternoon.

THE COURT: Good afternoon.

And thank all three of you for representing the plaintiff pro bono.

And for defendants Genoves and George, do I have Joshua Weiner on the line?

MR. WEINER: Yes, your Honor. Good afternoon.

THE COURT: Good afternoon.

Do I have Aaron Davison on the line?

MR. DAVISON: Yes, your Honor. Good afternoon.

THE COURT: And for defendant John Willis, is James Frankie on the line?

MR. FRANKIE: Yes, your Honor. Good afternoon.

THE COURT: I will note that the City of New York is represented by the same counsel who represents defendants Genoves and George.

This is our case management conference following the close of discovery, and in light of the premotion letters indicating an intent to file motions for summary judgment by, I think both sets of defendants, I will use the conference to explore a little bit the anticipated summary judgment motions and to set a schedule which will be prompt for the briefing of such motions. I also have some thoughts about the means of presenting the facts to me, which hopefully will result in it being done in a clean, efficient way.

Let me begin though with -- before I ask the defendants about the nature of their motions, who will be speaking for plaintiff?

MR. ELLIS: Your Honor, this is Justin Ellis. Lauren Dayton will be speaking.

THE COURT: Thank you.

Ms. Dayton, here is the principal question I have.

In each of the response letters you have to the two sets of motions, there is a statement in the footnote that says you're only proposing to move against some of our pending claims, but the footnote doesn't state what the other claims are that you believe are still alive in the case that defendants haven't indicated an intent to move against. I was having difficulty figuring out what they could be.

So, Ms. Dayton, let's begin with Mr. Willis. What claims do you believe are still in the case brought by Mr. Willis? I recognize it's challenging here because we've had a series of pro se complaints, and those present some interpretative challenges. Nonetheless, through discovery, I was a little bit alarmed at what might be some confusion among the parties as to what claims are in the case. So please tell me beginning with just the Willis complaint, the claims against Willis.

MS. DAYTON: Certainly, your Honor. The question is which claims do we believe he is not moving for summary judgment?

THE COURT: No. I want to know just what claims you think are in the case. It may be that the problem here is you think there are more claims in the case than the defendants think. I fully expect that by the end of this conversation, the defendants are likely to tell me if in fact you identify a claim that they haven't specifically addressed in their letter

that they would have intended to signal intent to move against that too; they just hadn't been aware the claim was in the case.

Since your footnote didn't spell out the other claims, just give me a list for the claims you've still got against Willis.

MS. DAYTON: Certainly, your Honor.

So, against Captain Willis, we believe we've got a Fourteenth Amendment claim for excessive force and deliberate indifference.

THE COURT: Anything else?

MS. DAYTON: No, your Honor.

THE COURT: I mean, I understood the defense motion to explicitly or, rather, premotion letter to explicitly take issue with excessive force. I read it as well to anticipate a motion for summary judgment as to deliberate indifference.

Just briefly yes or no, Mr. Frankie, is it your intention to move for summary judgment as against both claims or just one of those?

MR. FRANKIE: Well, it would be with respect to both, but to be honest, your Honor, I don't see a claim for deliberate indifference to medical needs in the complaint.

THE COURT: Let's pause on that. We will get back to that in a moment. Just put a flag on that.

Let's just go back then to the other set of

defendants, now the Genoves and George. Ms. Dayton, what are the claims that you believe are still in the case as to the Genoves and George defendants.

MR. ELLIS: So, the same claims for excessive force and deliberate indifference under a participant liability theory, and then failure to intervene to prevent Captain Willis's excessive force and deliberate indifference.

THE COURT: All right. I had read clearly the defense to be contending -- to be moving for summary judgment on the failure to intervene.

Let me ask who will be taking the lead for Genoves and George?

MR. DAVISON: Mr. Davison, your Honor.

THE COURT: Mr. Davison, did you understand those both to be claims, for better or worse -- I understand that you challenge the merits of the claims and all -- but did you understand both of those claims to be live in the case as against your clients?

MR. DAVISON: No, your Honor. Defendants Genoves and George only believe the failure to intervene claims to be alive in this case.

THE COURT: Not the claims that they were actually participants.

MR. DAVISON: Yes, your Honor.

THE COURT: May I ask you though, sticking with you,

Mr. Davison, look, having not studied the complaints with a close eye to figuring out whether each of the claims Ms. Dayton has identified are in fact fairly discerned in the pro se -- the most recent version of the pro se complaint, let us assume for argument's sake that the complaints literally read in light of the pro se authorship are taken to allege participation. I take it for similar reasons - not identical, but similar reasons - that you would be moving for summary judgment on a failure to intervene, you would be arguing that the act or omissions or whatever the plaintiff contends constituted participation, you would be presumably intending to move for summary judgment on that too?

MR. DAVISON: Yes, your Honor, that's correct.

THE COURT: And similarly for you, Mr. Frankie, putting aside your dispute about whether the deliberate indifference to medical needs are in the case, assuming that I was to conclude based on a generous reading of the pro se complaint that it was pled, I take it you would also be moving for summary judgment on that ground, on the grounds that from your perspective the evidence falls short of permitting a jury finding on at least one element of that claim.

MR. FRANKIE: Yes, your Honor, and the --

THE COURT: All right. The reason I'm going here is I want to make sure we start off this process on sort of agreement on what the, you know, issues are. Ms. Dayton has

helpfully broken out -- it's not as expansive as I feared because I know originally there was something like a First Amendment claim and a Fourth Amendment claim that I think the pro se plaintiff articulated, I'm heartened to know that there is no attempt to revive those, but Ms. Dayton has identified the couple of claims as to each party.

I think the best way to do this is as follows: I'm not on this call going to referee a dispute about the proper reading of the complaint. So, defense counsel, you are on notice that the plaintiff perceives there to be an effective pair of live claims for each set of defendants: For Willis, Fourteenth Amendment, excessive force and deliberate indifference with respect to medical needs, and for the Genoves and George defendants theories of both participation and failure to intervene in connection with excessive force.

Defense counsel in moving for summary judgment, you are at liberty to proceed in one of two ways as to the claim that you state you had been unaware the plaintiff was still pursuing. You're obviously at liberty to argue that there simply was not sufficient evidence adduced in discovery to support that claim, a traditional summary judgment argument, but I am fine as well, in addition, arguing that even before we get to an evidentiary issue, the pro se complaint is not properly read to support such a claim or that the intervening litigation by counsel clearly took that off the table or can

only be read to imply counsel's view that there was no such claim in the case. You're at liberty to include arguments along those lines.

I expect at the end of the day I'm principally going to be focused on what the evidence supports because as to both of the disputed claims here -- deliberate indifference to medical needs for Willis and participation as to Genoves and George -- they are so, you know, closely tied to the well-pled claim for Willis for excessive force and for Genoves and George for failure to intervene that there's a decent chance I'm not going to block the claim from reaching summary judgment. I will largely, I expect, be focused on whether or not the evidence permits it to clear summary judgment.

So, in any event, defense counsel, just so we don't have an issue at the end of briefing of your having failed to engage with the claim, now we know what the full spectrum is.

OK, Mr. Frankie, understood?

MR. FRANKIE: I believe so, your Honor.

THE COURT: And, Mr. Davison, understood?

MR. DAVISON: Yes, your Honor.

THE COURT: OK. So next question, now focusing on defense counsel, let me -- and I think this question is probably better put to Mr. Davison. I was intrigued from the letters just to understand that there's a video here, and it strikes me that the video may be important for -- is likely to

be important for everybody's claims, it may be especially important in assessing the failure to intervene claims insofar as if the video is reasonably complete, it may very substantially provide the relevant factual basis for judging the arguments that Genoves and George are making about no duty to intervene, no time to intervene, all those sorts of things.

So, Mr. Davison, tell me about the video, does it capture all events from start to finish.

MR. DAVISON: Your Honor, it does not capture the events visually; it does capture the events audibly.

THE COURT: Ahh, that's very important. I thought it was described as a video. What is shown on video?

MR. DAVISON: So, the camera operator is stationed around the entryway of the cell and cannot really see into the cell where both plaintiff and the three defendants in this case are. And that's pretty much where it stays until after the Capsicum is sprayed, and then he's handcuffed and taken out of the cell. And then from there on, you can see what happens when he is taken out of the cell and taken to the intake area.

THE COURT: But, in other words, at the critical moment when he is sprayed, is that caught on video?

MR. DAVISON: Visually it is not caught on video, but you can hear when it happens.

THE COURT: How can you -- I mean, if a person was trying to time the length of the spraying, would you be able to

from the audio?

MR. DAVISON: Yes, your Honor.

THE COURT: Is it that loud? Is it obvious when it's on and off?

MR. DAVISON: Yes, your Honor. Defendants contend that it is obvious when it's on and off, and, indeed, plaintiff testified that he could hear when the spray happened, and that it was short.

THE COURT: No, I understood in his testimony that it's short; I'm just trying to understand if one didn't get into the testimony and just used the video as, you know, objectively accurate as to what it indisputably shows, I'm trying to figure out what it shows. Is this a hand-held or is a stationary-like security camera?

MR. DAVISON: Hand-held.

THE COURT: What occasions the video to be made, Mr. Davison?

MR. DAVISON: So, whenever a probe team is called to an incident which was happening here, a probe team was called, one of the members of the probe team has to have a camera and must film the incident as it's happening. So that was the reason why.

THE COURT: I see. That's interesting. Is that a requirement of relatively recent vintage like the body cameras or does that go back some time?

MR. DAVISON: I believe it goes back some time, and it is included in the DOC policy.

THE COURT: Got it. And so the reason the camera doesn't capture the key events is just that the spatial relations didn't permit the camera to be in a useful place. How come the camera essentially misses the key activity here?

MR. DAVISON: Yes. So, the way it starts is that, you know, so there are five probe team officers. Captain Willis goes in first, followed by George and Genoves. And so, you know, they're in the cell with plaintiff, and then another officer, who is a non-party here, Officer Jordan, is stationed kind of in the entryway, and the camera operator, being the last person, was just behind him. And so for whatever reason, she didn't move up to go into the cell to look, to station the camera so they could see. She stayed there the entire time.

THE COURT: If I were trying to imagine the events from your clients' plural perspective, the audio sounds like it captures -- we know that they're in the room, and it captures the start-and-end moment. Does it situate where your two clients are relative to Willis and relative to Ross?

MR. DAVISON: It does somewhat. I think it does in the beginning because you can see how they each enter. As I said before, it was Willis first and then -- I can't remember the actual, you know, whether it was Genoves or George first, but you can see each of them go in after one another so you can

kind of go off of that, but afterwards I guess you can't really say where they are in the cell except that they went in after a certain person.

THE COURT: Got it. So, among the issues to be litigated here involves the failure to intervene, which implies some notice that in effect a constitutional violation either was under way or was clearly about to happen.

One concern I have, particularly with the patchy video, is that the audio may be less than crystal clear as to the words that are being articulated or, for that matter, by whom. Have the parties per chance created a transcript or something that everyone agrees reflects, you know, in sequence what words were said by whom?

MR. DAVISON: We have not done that. However, we can do that. We're fine with doing that, because we believe that you're able to hear who is saying what and, you know, and what's being said.

THE COURT: All right. Then let me pause on that and make the following proposal. In a few minutes when I get to next steps, I'm going to set as our first date before anyone's first brief is due a deadline for a submission of what I call a joint set of stipulated facts, or a JSF, in which you negotiate to put together a comprehensive list of all facts that everybody agrees are undisputed.

I would like immediately, and I will ask the defense

to take the lead on this, for you to create, you know, what you believe to be a neutral transcript of the words used on the video or at least the parts of the video that matter. You don't have to do -- if it's a long thing and large parts of it everyone agree are irrelevant, you can tell me that this is the transcript covering minutes one through five, or something like that, whatever. But once you do that, send it over to the plaintiff, and hopefully you will be able to reach agreement or at least substantial agreement as to words and attributions. And to the extent of your agreement that can be included as an agreed transcript in the joint statement of facts. I'm not forcing you to agree if it's something you don't agree with and if there's a point in dispute, you can flag in a footnote what the disputed words are as you each separately hear them.

But given the likely importance of this piece of evidence, I don't want to be at sea watching this on a computer in my chambers and saying "Who said that" or "What did they say?" So your guidance for me will be helpful.

So, let me just ask to put the responsibility on somebody, Mr. Davison, would your set of counsel take the lead on putting together a first transcript and then make sure that you've gotten buy-in to the extent possible from the others.

Will you do that, please?

MR. DAVISON: Yes, your Honor, we can do that.

THE COURT: All right. Let me ask Mr. Willis --

excuse me -- Mr. Frankie for Mr. Willis about the -- you're moving for -- proposing to move for summary judgment not just on qualified immunity grounds, but I gather on the merits; that there is literally no way a finder of fact viewing the evidence in the light most favorable to Mr. Ross could find for your client, correct?

MR. FRANKIE: That's correct.

THE COURT: Help me with how that is so. In other words, if you take the perspective of Mr. Ross, which is that he is basically inert and not resisting, and you take the case law that's been quoted to me that says, in effect, you can't do that with respect to somebody who isn't a threat of violence, and if you credit, I gather, a basis in the testimony to believe that he wasn't perceived to be violent, how is it that the excessive force issue isn't a jury claim? There have been verdicts for people who have been pepper-sprayed. So, it can't be that the nature of what happens to Ross is kind of not covered by the excessive force doctrine. Help me with isolating the elements here that you think literally could not viewed in a light most favorable to your adversary be found for your adversary.

MR. FRANKIE: Well, because -- and I think Mr. Ross even conceded this at his deposition, that when they attempted to handcuff him, he pulled away and made some of the comments I mentioned with respect in my letter to the Court. So, he's

clearly resisting. Whether or not my client said, "Well, I didn't know or necessarily perceive it as" --

THE COURT: Wait. Pause. Pause. He's resisting what? He's resisting going to court, but he's not in engaging in force towards the defendants, right?

MR. FRANKIE: Well, he's resisting being handcuffed. They are trying to grab his arms so they can cuff him and take him out of the cell to produce him down in the intake and go through the process of having him processed for transport to court. When he's saying "no," one of the officers attempts to handcuff him, and he pulls away. I believe in his testimony, he said he didn't recall whether he pulled away once or twice. The officers would say it was certainly more than one time that they attempted to grab hold of his arm to place handcuffs on him, and he pulled away.

You have the additional problem of he's in ESH housing, where everyone in the jail, in the facility, they know that this is a special housing for people known to have violent propensities, especially jail-based, of being assaultive, known to being weapons carriers. Those type of individuals are the ones that get housed in this special housing so they know the type of inmate they're dealing with with respect to that.

And the plaintiff's counsel in their letter, they say, "Well, he didn't feel threatened." But also in his testimony, he says, "When I'm the probe team, and I respond to an alarm,

it's always a threat. And when I'm dealing with an inmate, I'm always threatened. I treat every inmate as a threat." And now you have him saying that. You have an inmate who's refusing to be handcuffed, who pulls away, who's in ESH housing. And I think that in hearing that, in hearing those things, I think it is pretty clear that just based on the facts alone that what happened was, and there's a spray, which is, according to the use of force continuum, the least amount of force you can use with respect to using any force at all.

They attempted to grab him and handcuff him without resorting to anything else. That was unsuccessful. They have to produce him for court. And the qualified immunity question aside, I think that's enough to warrant summary judgment.

THE COURT: One would have to consider -- I gather Mr. Ross contends that he put the officers on notice that he had some sort of medical condition, I mean, breathing or something, right?

MR. FRANKIE: No.

THE COURT: There's no testimony by Mr. Ross that would tend to alert the officers that he had some preexisting condition, Mr. Frankie?

MR. FRANKIE: No. What he said after he was sprayed and not anytime before -- because I questioned him at the deposition, and I said, "When they warned you more than once that they were going to spray you, why didn't you tell them you

had asthma?" And I believe in the deposition he said something like it slipped his mind or he was sleepy and didn't think about it and it might have just slipped his mind; but as soon as he's sprayed, within seconds after being sprayed, he says, "I have asthma."

THE COURT: Got it. But, in other words, prior to the termination of the spraying -- sorry -- does the spraying go on after he says what you just quoted to me?

MR. FRANKIE: No.

THE COURT: All right. Plaintiff, let's focus on that claim. Just very briefly why is Mr. Frankie wrong -- not focusing now on qualified immunity but focusing just on the merits, why is Mr. Frankie wrong about that, Ms. Dayton?

MS. DAYTON: For two reasons, your Honor. First, the attempts to pull away his arm are hardly the kind of resistance that the Second Circuit has concluded would be necessary to preclude a jury from deciding whether Captain Willis's actions were reasonable under the circumstances. The entire inquiry here is objective reasonableness, and whether an officer's actions are reasonable depends entirely on the context.

In this case, as recounted by Mr. Davison, there were five officers wearing riot gear surrounding Mr. Ross, who was lying down in his bed. All of the defendants agreed at their deposition that he was on his bed, lying down during the entire incident, and the circumstances were such that his act of

withholding his arm to be handcuffed was not the kind of resistance that warranted being sprayed with a chemical agent. And the DOC policy in effect at the time required Captain Willis to check before spraying Mr. Ross because, I mean -- at pretrial, @(unintelligible) like Mr. Ross, who has contraindications for chemical agent, could have serious consequences. It could have serious consequences if he's been sprayed with it. So the resistance that Mr. Frankie is referring to is simply not great enough to warrant taking this question away from a jury.

And the other point I'd like to make --

THE COURT: But does the -- yeah, go ahead, Ms. Dayton.

MS. DAYTON: I was going to pivot to talking about the ESH housing, but I'm happy to answer your question.

THE COURT: Go ahead with that point.

MS. DAYTON: The Second Circuit recently addressed this very point in a case called *Frost*, and it rejected the argument that -- it concluded that force can be accepted under circumstances where it has been clearly established even if the inmate has a history of aggressive behavior. The Second Circuit quite reasonably noted that an alternative rule would place few restrictions on officers' treatment of individuals with extensive disciplinary records, and that those individuals would therefore have fewer constitutional protections than

other pretrial detainees.

THE COURT: All right. Helpful.

Look, I think for both of you this frames the issues well. Let me ask you just one final question, Ms. Dayton. How much of the case law deals with this setting? In other words, Mr. Frankie makes the point that the nature of the particular, I guess, portion of the prison that Mr. Ross was in meant that the people there were at some heightened level of dangerousness. Is there a bright line in the case law that says categorically, you know, refusing to give your arm over to being handcuffed can never justify the spraying or are there cases more fact specific and don't in as many words say just that; that essentially this is a bright line rule, and if you spray where a person who has done nothing but refuse to give their arm over to be handcuffed, you're violating the law?

MS. DAYTON: So, your Honor, I haven't -- well, I guess two things. First, there are fewer cases addressing the Fourteenth Amendment pretrial detainee context, but the Second Circuit has applied the Fourth Amendment case law to Fourteenth Amendment excessive force claims. The standard is the same as the Supreme Court noted under *Kingsley*.

So, I guess, to answer the first part of your question, I don't think there is as robust a case law under the Fourteenth Amendment, but it doesn't matter because there is plenty of case law under the Fourth Amendment, and the Fourth

Amendment cases have focused on whether there often is an arrestee, where the arrestee was confined or was not a safety threat to officers, and so the amount of resistance is always assessed in proportion to the situation. Not to mention in this case, Mr. Ross was surrounded by five officers wearing riot gear, and his resistance was that he was too sedated by psychiatric medication to want to attend court. And so I guess the short answer is no, there is not a bright line rule, as there rarely is, in this context.

THE COURT: Right. I guess the issue is part as to what that may suggest on the one hand a greater facility for the plaintiffs to get to a jury, but it may have bearings as to qualified immunity, no?

MS. DAYTON: Excuse me, your Honor, would you mind repeating the question?

THE COURT: Sure. The fact that there is no bright line rule on the one hand where facts and circumstances matter, summary judgment tends to be less likely available. Obviously, it depends. But where the permissibility of conduct is a function of case-specific often fact and circumstances, that often is the type of claim as to which a defendant has a stronger argument for qualified immunity.

MS. DAYTON: I understand the question.

So, if I stated that there was no bright line rule that using pepper spray under these circumstances was

excessive, then I misspoke. What I intended to say is that I'm not aware of a specific case saying -- because I believe your Honor's previous question was whether there is a specific case saying that whether or not an inmate is in ESH housing, it can never be a factor considered in deciding whether or not the force was excessive. The case that I cited before, *Frost*, the Second Circuit case that was decided recently concluded that that couldn't be a reason that the force could be justified, simply the fact that it was an enhanced housing situation, because a rule otherwise would mean that prisoners in or in this case pretrial detainees in enhanced security housing would have fewer constitutional rights than other pretrial detainees, who are presumed innocent and who can't be punished under the Constitution.

THE COURT: Very helpful. That answers my questions.

Counsel, let me stop at this point. I think you all get a sense of the basic interplay here. Sorry, forgive me. I erred here.

Ms. Dayton, I have one other set of questions to ask you. The theory of failure to intervene, is it that the defendants had an obligation to intervene before the constitutional violation began or is it that they had an obligation to intervene during the spraying or both?

MS. DAYTON: It's absolutely that they had an obligation to intervene once they knew that the violation was

likely to occur.

THE COURT: Likely to occur. In other words, your claim is not confined to the duty that arose once the spray began to be fired. You're saying that at some point beforehand, Genoves and George understood from Willis's statements and behavior that he was apt to engage in excessive force; he was apt to spray somebody whom the law categorically forbade him from spraying.

MS. DAYTON: They testified at their deposition that they heard Captain Willis say that he was going to spray Mr. Ross, and they knew that Captain Willis had not followed the steps that are required under DOC policy, including to check to see if inmates have contraindications for the use of pepper spray.

THE COURT: All right.

MS. DAYTON: I just wanted to clarify, your Honor, the standard is *Hurley* is an officer who observed a Constitutional violation or has reason to know that it will be.

THE COURT: I will benefit -- because usually when I see this problem, it involves a violation under way. I will benefit to the extent you are able to collect cases when you're defending against the motion for summary judgment on the failure to intervene, I'm eager to see cases that apply -- and this is for both sides -- that apply failure to intervene standards where the conduct is essentially about to occur but

hasn't occurred. And the reason I say this and this should be obvious to all is, at least based on the letters, the duration of the spraying is extremely short.

So, if the defendants, Genoves and George, didn't have an obligation until the spraying began, then you wind up with an issue of how reasonable is it for the law to require intervention during what may be only a two-second period.

If, on the other hand, there is a duty to intervene that precedes the beginning of the spraying and is, in effect, as Ms. Dayton says, at the point in which the spraying becomes likely, that moves the starting gun from a time perspective back a number of seconds and makes the claim stronger.

I'm eager for both of you in your summary judgment briefs to engage with apposite authority that deals with officers who were being faulted for failure to intervene where no violation is likely to occur but before it has begun to occur. So just as a note, that will be of assistance to the Court in your briefing, so please be alert to that.

With that, let me -- and this is obviously not the forum in which to debate to conclusion the merits. I just wanted to get a better understanding of the principal arguments or the areas of them that I needed a little help with, and I want to thank Ms. Dayton, Mr. Frankie and Mr. Davison for sharpening my understanding of the case.

Let me turn next just to the process for briefing

summary judgment. Time and again, I have asked or directed counsel to precede the filing of the first brief with a JSF, a joint set of stipulated facts. The JSF looks a little bit like a 56.1 statement in that it is a numbered list of individual factual propositions. What is it intended to be? It is intended really just to be a list of those facts that all parties agree are accurate. You're not stipulating to materiality. You're not stipulating to admissibility. You're simply stating that the fact is true.

And what I tend to do is I put the initial drafting onus on a moving party. That person then drafts up as long a set of stipulated facts as they feel is necessary or they can come up with, and then the pen turns to the other party or parties to annotate it and to add to it; but at the end of the day, we wind up with hopefully a fulsome set of facts that are not really disputed.

And the benefit of all of this is in the 56.1 statement, you need not cite authority or the exhibit or the transcript cite for the proposition in question. It is your act of stipulating that establishes that fact. And, therefore, all the hard work that goes into a 56.1 statement where you're harvesting depositions and dates and physical evidence and so forth, all of that goes away as to the JSF. To the extent there are facts you don't stipulate to, you need to showcase them to me in the usual way through a 56.1 statement joined, no

doubt, by a 56.1 opposition.

But I am told time and again by counsel that this device winds up being a timesaver. It means that when you begin drafting your summary judgment brief, you've got handy dandy a set of stipulated facts that may cover a very large amount of the waterfront, and it makes it a lot easier to draft your facts. And I in turn, and my law clerk in turn, invariably find it helpful to have a fulsome set of stipulated facts.

My law clerk will send you after this call three or four examples of go-bys, of models of particularly well-done JSFs that my chambers has received which will help give you some guidance. But, trust me, you will find this useful in your 56.1 statements with the, you know, documentary or deposition backup to show that there is admissible evidence to prove the proposition will, of course, be correspondingly smaller.

Let me -- I'm going to put on the defense as the movant the onus of doing the first draft of the JSF, and I think what I will do is put it on counsel for Genoves and George, who also happen to represent the counterclaim defendant the City, the first obligation to draft it. I expect you'll be in active touch with Mr. Frankie as you do it so that ultimately what goes to the plaintiff will be a set of proposed stipulated facts that both sets of defendants agree are

accurate. And then, Ms. Dayton, you and your colleagues are to look at it where the fact stipulated to by the defense is or proposed by the defense for stipulation is clearly accurate. I expect you'll accede to that, but you should tweak any facts where as articulated they are misleading or inaccurate, and you should obviously add other facts. But this is not a game. I don't want people trying to knock out each other's facts by adding adjectives or adding spins that they would like or adding legal coloration. That's out of bounds. This is, you know, counsel are expected to behave collegially and acknowledge facts that are undisputed. If the defendant or the plaintiff admitted something in a deposition, it is what it is.

And part of the JSF is also a nice forum for you to authentic documents. Exhibit 1 is a videotape, which was taken from such and such an angle from such and such a person that captures the time period, you know, X to X plus ten minutes or whatnot. But it's an opportunity for you as well to authentic and attach exhibits. Again, the facts that are in the JSF are not -- you're not stipulating to admissibility or materiality that matters to Ms. Dayton that, you know, the Mets won World Series in 1969, since that's a determinable fact, everyone should stipulate to it, and later on you can tell me why that was irrelevant, but the point is it's 's not about relevance, it's just about factual accuracy.

So, the question for you, Mr. Davison, since you'll

have the first pen on this, usually I give parties about a couple of weeks to get a JSF in. In a case like this, I would do it shorter because of the very tight timeframe in which all events play out. On the other hand, I'm mindful there's Thanksgiving. So, I'm inclined to basically give all of you -- what's today -- November 23, let us say, you know, two weeks to get the JSF, something like December 7 or so. If you need a day or two more, speak up now, but can you do that?

MR. DAVISON: Yes, your Honor. I believe we can do that from defendants George and Genoves.

THE COURT: The goal is I want the whole thing submitted within two weeks.

MR. DAVISON: Oh, yes.

THE COURT: That's going to be the trigger that then -- from which the deadline for the first brief by defense counsel, or each set of defense counsel, has to come in. So the idea is if I give you two weeks to submit a JSF, at about the halfway point or so of that, you ought to be turning around the draft to your adversaries, you know, so that they can then do a turn on it promptly amending inaccurate or problematic statements but mostly adding their own.

So, what I would have thought would be the due date would be December 7, but before we go there, I'm giving you a chance to tweak that.

MR. WEINER: Your Honor, this is Joshua Weiner for

defendants Genoves, George and the City. I'm sorry to interrupt. I just want to pipe in and say I think given the upcoming holidays, three weeks might be more realistic. A lot of things that -- a lot of documents that we prepare often have to be seen by others, so those people are probably the people who will be supervising us are expected to be out of the office for some period of time. So I think maybe three weeks for the whole joint statement of facts would be appreciated.

THE COURT: I'm amenable to that. That's fine. But keep in mind that, look, this is as narrow a factual prism as you're going to get. It's a very short series of events that plays out over a very limited period of time. So, that's fine, but I don't want to -- you know, I'm anticipating a rather compact briefing schedule here, and if I move this to December 14, the next thing you're going to tell me is the next extension takes us into the holiday days, and I'm really trying to move this a bit. Can we possibly do it -- because I would like to get your opening brief in before the holidays. If we make it instead of December 14, which is a Monday, something like December 10, which is a Thursday, can we make that work, and that way it would be more realistic for me to give you a two-week deadline for your opening brief, Mr. Weiner.

MR. WEINER: Yes, your Honor, I think that would work.

I had another question about the joint statement of facts while we're discussing it. Your Honor mentioned that it

would be an opportunity to authenticate documents. I took that to mean authenticate documents for the purposes of the motions for summary judgment, not for later at trial.

THE COURT: No, no, no. I mean, if you're stipulating to a fact that this video is authentic, you can't go back on that later on. The whole point is -- I mean, you're not stipulating to admissibility, but you're authenticating the document. This exhibit is an email from person A sent on date B. This video is the video taken outside of Mr. Ross's cell. That's what I mean by authenticating. Obviously, if you authentic a baseball from the 1969 World Series, it's authenticated, but it's not admissible, but I'm talking about authentication.

MR. WEINER: Right, I understand. I guess my question was more, say, there's a document that wouldn't go to summary judgment but might go to trial, such as maybe an impeachment, a document that pertains to impeachment or something like that, would that be sort of part of the process of the joint statement of facts?

THE COURT: No, you're not obliged to put before me material that nobody is relying on at the summary judgment stage -- prior inconsistent statements, you know, criminal record used to impeach, things like that. You're not obliged to empty your evidence cart here. But to the extent that you're addressing a piece of evidence and you make a

stipulation to it, you're bound by it all the way through. It's not a game where you can change your position about this is authentic or this happened later on. If you stipulate that an event happened, that a witness said a particular thing, that a tape is authentic, that a particular email accurately reflects an email sent by Jones to Smith on a particular day, you're bound by that all the way through, OK?

MR. WEINER: Yes. No, your Honor. My question was more going towards the scope of the documents that should be included.

THE COURT: No. This doesn't limit what you can do at trial in terms of scope. You're welcome to offer other things. I've had cases indeed defended by the City where the JSF covered a certain amount of material, the case nevertheless went to trial, and then the City had a ton of other material in the nature of impeachment evidence, which proved to be very effective, but really which had no proper place on summary judgment. That happens all the time, and that's fine.

Does that answer your question?

MR. WEINER: Yes. Thank you, Judge.

MR. FRANKIE: Your Honor, I'm sorry, this is Mr. Frankie. Your Honor, just so I understand, Mr. Davison, as you said, is the first one that's going to put, I guess, pen to paper on this. Then he gets it to me or we confer -- after I see his first draft, we confer, and then we have to get that

then to plaintiffs.

THE COURT: Yes.

MR. FRANKIE: I understand your concern with the constraints, but, for example, I don't know when they're going to get their first draft.

THE COURT: Mr. Frankie, this is really not complicated. You're working hand-in-glove with these people. You're collaborative. You're professional. I'm giving you three weeks. That means it takes about a week and a half to get it to the other side. You're perfectly capable of banging out tonight on your computer the propositions that matter to you and send it over to them, and ask them to include it. You're not a bump on a log. This is not hard.

MR. FRANKIE: Fair enough. I'm just thinking because of the holiday, and I actually have a virtual trial starting a week from today that should only last a few days, but I'll work it out with them.

THE COURT: Look, remember, this is about as compact a storyline as you're ever going to get in a federal trial, and it shouldn't be hard for you to take an hour of your time reviewing the records in your case and identify in some coherent way the discrete factual propositions that you want to be in the JSF, in effect, what you feel you are going to need to ably litigate the motion for summary judgment that you have already written me about.

MR. FRANKIE: OK.

THE COURT: So, look, I'm going to set December 10 as the deadline for the JSF. Mr. Davison, I expect that before you do the turn, before you send it to the plaintiffs, you will be collaborating with Mr. Frankie. So it is incentive for you to get out of the gate pretty quickly on this.

MR. DAVISON: Yes, your Honor.

THE COURT: Now, plaintiff, I take it with my having already granted the extra week, I take it, Ms. Dayton, the prospect of getting me a JSF from the plaintiff's perspective by December 10 is not a problem.

MS. DAYTON: That's correct, your Honor.

THE COURT: OK. So then, defense, I would like to make your respective summary judgment motions -- and they are obviously separate; they are closely related, but they are distinct -- due two weeks from December 10. In other words, the 24th. You're welcome to get that in early. If anyone is leaving for the holidays these days, you're welcome to get it in early. There's nothing that prevents you from doing that, but usually counsel tell me that they're thinking about and working on their summary judgment motions as they are drafting the JSF because the JSF is awful close to a statement of facts. It's not literally a statement of facts, but particularly for the defense as a movant, you are thinking about, you know, what facts I want in there. And so in the process of drafting and

in the process of preparing, stipulated facts very much are interlocked.

So, beginning with you, Mr. Davison, due date December 24 for your opening motion?

MR. DAVISON: Yes, your Honor, that should be fine.

THE COURT: And Mr. Frankie?

MR. FRANKIE: Yes.

THE COURT: Now, plaintiff's counsel, usually I give two weeks for an opposition to summary judgment. I am mindful though that the first of those weeks is the week when any lawyer has sought to take their vacation.

Am I correct, Ms. Dayton, that you are not -- your team is not an exception to that rule?

MS. DAYTON: That's correct, your Honor.

THE COURT: All right. So, let me give you three weeks. I'm just being a realist here, having been a practicing lawyer back in the day. How about January 14, which is three weeks for plaintiff's opposition?

MS. DAYTON: That works for us, your Honor.

THE COURT: And then the 14th, if my math is right, puts it at a Thursday. How about 11 days from then, the 25th, which is a Monday, for the defense reply, Mr. Davison?

MR. DAVISON: Yes, that's fine, your Honor.

THE COURT: And Mr. Frankie?

MR. FRANKIE: Yes, your Honor.

THE COURT: Good. I will issue a scheduling order that literally just sets out those dates. My law clerk will email you today or tomorrow several models which I think will give you a sense of way these look. But, trust me, if you haven't done it before -- and I think most counsel in the district have done this many times because I'm not the only judge who insist on this -- I think you will find it to be, if not life-changing, useful.

With that, let me just ask before we adjourn just going around the horn but beginning with the movants if there's anything else that I can usefully take up at this premotion conference. Mr. Davison?

MR. DAVISON: No, your Honor, I think that is all.

THE COURT: Mr. Frankie?

MR. FRANKIE: No, your Honor.

THE COURT: And Ms. Dayton?

MS. DAYTON: Nothing from plaintiffs.

THE COURT: All right. Look, I want to wish everyone a healthy and happy holiday season. I know how bizarre the season is and how trying the year has been, and I hope all of you are able to find some fun and solace and have some relaxation during the holidays. I wish you all well and look forward to seeing you down the road.

I will reserve for now on whether to have oral argument in the case. It just depends on based on my review of

the papers as they come in where it feels like the kind of case where I would be advancing the ball by having argument or merely making counsel engage in an exercise that isn't ultimately that helpful in deciding the case, but I will make that judgment once I review the papers. In any event, be well, stay safe, and I look forward to seeing you down the road.

Thank you. We stand adjourned.

ALL COUNSEL: Thank you, your Honor.

(Adjourned)